Rules promulgated by a superior court under statutory authority for the guidance of lower courts are generally held to have the force and effect of statutes and to require strict observance.[12] This is necessary for proper discipline and for uniformity. It is a simple matter to amend such rules if they are found to operate harshly.

Whatever the character of the rule, it should certainly be open to the parties to agree, with the consent of the court[13] of course, to waive its requirements in order that the merits of the cause may be more rapidly and conveniently adjudicated.[14] There is no one to complain of the non-observance. However, the recent case of *Presho State Bank v. Northwestern Milling Co.* (1922, S. D.) 186 N. W. 560, involving rules adopted by the Supreme Court under statutory authority[15] for the guidance of lower courts, holds otherwise, giving the questionable reason that it might prove embarrassing to an attorney who did not wish to consent to a suspension desired by the court.

Court rules are merely a means to an end, and not an end in themselves.[16] This decision illustrates how important it is that this be kept in mind when the rules are framed. For if they do not permit a discretionary enforcement in all proper cases, they will prove, even under the proposed new system, too rigid to accomplish, in whole, the objects desired.

PRIVILEGED DEFAMATION

When the newspapers attempted to aid the Government in arresting war slackers, by publishing lists of names supplied by the War Department, the probability of their action raising an entirely new phase of the law of privileged defamation was perhaps never considered. The "official" character of all news in war time so colored our concept of private rights that to balance them with the obvious necessity of victory was little considered. The New York World, at the request of the War Department, published the name of a supposed slacker. In an action for libel on the falsity of the statement, the defendant demurred to his complaint upon the theory that the publication was absolutely privileged. The court overruled the demurrer, holding that whatever might be the privileges of the War Department, such privilege did not extend to the defendant newspaper. *Hyman v. Press Pub. Co.* (1922) 199 App. Div. 609, 192 N. Y. Supp. 47.

The first question is that of absolute privilege. In the past it has been narrowly restricted, and has included only the proceedings of leg-

[12] *Freeling v. Kight* (1915) 49 Okla. 202, 152 Pac. 362; *Chester Traction Co. v. Philadelphia, etc. Ry.* (1897) 180 Pa. 432, 36 Atl. 916.

[13] *Missouri, etc. Ry. v. Kidd* (1906, C. C. A. 8th) 146 Fed. 499.

[14] *Allen v. Mayor of New York* (1880, S. D. N. Y.) 7 Fed. 483; *Dwinell v. Larrabee* (1853) 38 Me. 464.

[15] S. D. Rev. Code, 1919, sec. 5134.

[16] *Magill's Appeal* (1868) 59 Pa. 430.

islative or judicial bodies and acts done in the exercise of military or naval authority.[1] For the sake of the public good it is essential that the utmost freedom be permitted in certain cases—a judge should not be hampered by fear of litigation when he is administering the laws of the country,[2] and the legislator should be permitted fearlessly to support the interests of his constituency. In other fields, however, the public welfare does not require so great a sacrifice of the individual and it does not seem necessary to extend this privilege to the instant case.[3]

There are circumstances where one making a defamatory statement may not be absolutely privileged, but may have, nevertheless, the protection of a qualified or conditional privilege,[4] denied only if the plaintiff establishes that the communication was actuated by malice.[5] In the instant case the court did not say whether or not such a privilege existed, but permitted the defendant to withdraw his demurrer and file an answer. If this privilege exists, it will be necessary for the plaintiff to prove malice in the defendant before a recovery will be allowed.[6] In the past this privilege has been confined to cases in which the defendant was under the duty, either legal or social, of making the communication, or in which the statement was in protection of private interests, or to the reports of proceedings in the courts and the legislature.[7] Although the instant case does not fall definitely under any one

[1] *Mundy v. Hoard* (1921, Mich.) 185 N. W. 872; *Koehler v. Dubose* (1918, Tex. Civ. App.) 200 S. W. 238; *Hassett v. Carroll* (1911) 85 Conn. 23, 81 Atl. 1013.

[2] A judge is not liable for false statements made in judicial proceedings, even if made maliciously. *Mundy v. McDonald* (1921, Mich.) 185 N. W. 877.

[3] Newell, *Slander and Libel* (3d ed. 1914) 508.

[4] A privileged communication in the law of libel and slander is a defamatory communication made on an occasion of privilege without actual malice. *Ely v. Mason* (1921, Conn.) 115 Atl. 479.

[5] If express malice be found, it destroys the conditional privilege that would otherwise exist. *Gerlach v. Gruett* (1921, Wis.) 185 N. W. 195; *Andrews v. Gardiner* (1915) 168 App. Div. 629, 154 N. Y. Supp. 486. Questions of malice and good faith are immaterial if the privilege is absolute. *Bolton v. Walker* (1917) 197 Mich. 699, 164 N. W. 420. Malice, as used in connection with privileged communications, does not necessarily import hatred, ill-will, anger, wrath, or vindictiveness, but need be no more than the antithesis of good faith. *Cobb v. Garlington* (1917, Tex. Civ. App.) 193 S. W. 463. It may be established by showing that the defendant was actuated by an unjustifiable motive: *Gray v. Mossman* (1914) 88 Conn. 247, 90 Atl. 938; or that he had shown a wanton inclination to mischief, an intention to injure or wrong, or a depraved inclination to disregard the rights of others: *Morasca v. Item Co.* (1910) 126 La. 426, 52 So. 565.

[6] Lack of malice will prevent a recovery. *Conklin v. Augusta Chronicle Pub. Co.* (1921, C. C. A. 5th) 276 Fed. 288; *Hansen v. Hansen* (1914) 126 Minn. 426, 148 N. W. 457. In a case involving qualified privilege, the burden of proving malice is on the one defamed. Newell, *op. cit.* 479.

[7] A fair and accurate report may be made of a judicial proceeding either by repeating it literally and completely, or by giving a more or less condensed summary. *Age-Herald Pub. Co. v. Waterman* (1919, Ala.) 81 So. 621. Such

of these headings, it seems advisable to extend to it this qualified privilege. The doctrine of privileged communcations rests in public policy.[8] The instant case represents the publication of a report of an official branch of the Government, made for the purpose of bringing a criminal to justice.[9] The extent of the publication is reasonable for the purpose in view,[10] and consequently it cannot be said that the privilege

a report is a privileged communication. *Conklin v. Augusta Chronicle Pub. Co., supra* note 6. An impartial account of legislative or executive proceedings is privileged. *People's United States Bank v. Goodwin* (1910) 148 Mo. App. 364, 128 S. W. 220. But a publication charging a member of the legislature with corruption is not. *Littlejohn v. Greeley* (1861, N. Y.) 13 Abb. Prac. 41. The publication of the reports of police officers to their superiors is not privileged: *Billett v. Times-Democrat Pub. Co.* (1901) 107 La. 751, 32 So. 17; nor the publication of pleadings and preliminary papers: *Finnegan v. Eagle Printing Co.* (1920) 173 Wis. 5, 179 N. W. 788. The return of indictments by a grand jury is a judicial proceeding, and reports thereof are privileged. *Sweet v. Post Pub. Co.* (1913) 215 Mass. 450, 102 N. E. 660. So, also, proceedings before a magistrate, although no record of them is preserved. *Flues v. New Nonpariel Co.* (1912) 155 Iowa, 290, 135 N. W. 1083; *Bresslin v. Sun Printing and Pub. Association* (1917) 177 App. Div. 92, 163 N. Y. Supp. 915. Where a judicial tribunal proceeds without jurisdiction, its acts are extra-judicial, and a report of the proceedings is not privileged. See *Parsons v. Age-Herald Pub. Co.* (1913) 181 Ala. 439, 61 So. 345. If the court has jurisdiction of the subject matter, it is immaterial that it has no jurisdiction of the person of the party. *Lee v. Brooklyn Union Pub. Co.* (1913) 209 N. Y. 245, 103 N. E. 155. This privilege is also extended to executive and legislative proceedings and investigations. *Brown v. Globe Printing Co.* (1908) 213 Mo. 611, 112 S. W. 462. It is well settled that newspapers have no greater privilege of giving currency to libellous charges than have other persons. *Lundin v. Post Pub. Co.* (1914) 217 Mass. 213, 104 N. E. 480; *Elms v. Crane* (1919) 118 Me. 261, 107 Atl. 852. "Liberty of the press" merely means that newspaper publications shall not be subject to censorship. *Williams Printing Co. v. Saunders* (1912) 113 Va. 156, 73 S. E. 472. For a discussion of the right to enjoin a libel, see Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 642.

[8] *Alexander v. Vann* (1920) 180 N. C. 187, 104 S. E. 360; Newell, *op. cit.* 477. Publicity of official records is consistent with public policy. *Belo v. Lacy* (1908, Tex. Civ. App.) 111 S. W. 215.

[9] Communications otherwise slanderous are privileged, if made in good faith to an officer engaged in hunting a prisoner. *Beshiers v. Allen* (1915) 46 Okla. 331, 148 Pac. 141; *Eames v. Whitaker* (1877) 123 Mass. 342; *Elms v. Crane, supra* note 7. It is no defence, however, if the communication was published merely as news. *Heyler v. N. Y. News Pub. Co.* (1893) 71 Hun, 4, 24 N. Y. Supp. 499.

[10] The unnecessary transmission by telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege. *Williamson v. Freer* (1874) L. R. 9 C. P. 393. The mere fact of sending a defamatory communication on a post-card, made in circumstances which render the occasion privileged between the writer and the recipient, does not avoid the privilege if the communication contains no reference to the person defamed which is intelligible to third parties. *Sadgrave v. Hole* [1901] 2 K. B. 1. In regard to the advisability of extending to the telegraph company the privilege of the sender, see Smith, *Liability of a Telegraph Company for Transmitting a Defamatory Message* (1920) 20 COL. L. REV. 369.

was exceeded. While it is always dangerous to allow public excitement[11] to influence the courts, it is probably for the best interests of the community that there should be published broadcast[12] the names of those men who so successfully gained the contempt of their fellow citizens, even if mistakes are inevitable.

WORKMEN'S COMPENSATION—INJURIES CAUSED SOLELY BY DISEASE

Does an injury caused solely by a predisposed condition of the employee, such as dizziness, epilepsy, intoxication, weakness, etc., arise "out of" the employment within the meaning of the workmen's compensation acts? This problem was considered by the Connecticut Supreme Court of Errors in the recent case of *Gonier v. Chase Companies, Inc.* (1921) 97 Conn. 46, 115 Atl. 677, where it was held that the widow of a painter who sustained fatal injuries by falling from the staging on which he was at work was entitled to compensation, even though he fell because of unconsciousness caused by an attack of indigestion such as he was accustomed to have. The evidence showed that the deceased knew of his ailment and had been warned by his physician not to work as a painter. The court found that the conditions of the employment contributed to the injury,[1] but expressly followed the English case of *Wicks v. Dowell*[2] which held that the fall and not the fit was the proximate cause of an injury sustained by a workman who fell when seized with a fit. This decision, however, apparently has been restricted by subsequent English cases[3] to its peculiar facts and has not been accepted as establishing the proposition that an injury caused

[11] During the war a member of a Liberty Loan committee distributed circulars prepared by the county council of defence, containing libellous statements about the plaintiff because of his refusal to subscribe. These statements were held to be privileged in a "limited" sense. *McBroom v. Weir* (1920, Tex. Civ. App.) 219 S. W. 855.

[12] It is unnecessary to point out that newspapers will refuse to publish these lists in the future if it is decided that there exists no privilege. By statute in England such a publication as that involved in the instant case is given the protection of a qualified privilege. Law of Libel Amendment Act (1888) 51 & 52 Vict., c. 64. sec. 4. See (1922) 22 COL. L. REV. 374.

[1] See *Reeves v. Dady Corp.* (1921) 95 Conn. 627, 113 Atl. 162. The employee was engaged as foreman in the defendant's silk mill located on the second story of a factory. A fellow employee's account of the details of an operation caused him to become faint. He walked to an open doorway which was protected only by a bar three feet from the floor. His knees gave way and he fell to the pavement below. *Held,* that the accident arose "in the course of," but not "out of," the employment.

[2] [1905, C. A.] 2 K. B. 225. The employee's duty was to stand on a wooden stage near the edge of a hatchway and regulate the descent of a bucket which was being used in the unloading of coal from the hold of a vessel. While thus engaged he was seized with an epileptic fit and fell into the hold.

[3] *Nash v. Rangatira* [1914, C. A.] 3 K. B. 978; *Frith v. The Louisianian* [1912, C. A.] 2 K. B. 155; *Butler v. Burton-on-Trent Union* (1912, C. A.) 106 L. T. R. 824. The employee was seized with a fit of coughing and fell down a flight of